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9 **IN THE SUPREME COURT**
10 **STATE OF ARIZONA**

11 PETITION TO AMEND ETHICAL
12 RULE 1.5, RULE 42, ARIZONA
13 RULES OF THE SUPREME COURT
14 (WRITING EXEMPTION FOR
15 COURT-APPOINTED LAWYERS)

Supreme Court No. _____

**Petition to Amend Ethical Rule 1.5,
Rule 42, Arizona Rules of the
Supreme Court (Writing Exemption
for Court-Appointed Lawyers)**

16 Pursuant to Rule 28, Ariz. R. Sup. Ct., the State Bar of Arizona petitions the
17 Court to amend Ethical Rule (ER) 1.5, Arizona Rules of Professional Conduct,
18 contained in Rule 42, Ariz. R. Sup. Ct., as set forth in the attached Appendix A.

19 ER 1.5(b) requires a lawyer to confirm the scope and financial terms of
20 representation of a client “in writing,” both at the beginning of representation and
21 then during the representation when changing the rate or basis of the fee and
22 expenses. This petition proposes exempting court-appointed lawyers who are paid
23 by a court or other governmental entity from ER 1.5(b)’s writing requirement.

24 **Discussion**

25 ER 1.5(b) currently requires that:

26 [t]he scope of the representation and the basis or rate of the fee and
expenses for which the client will be responsible shall be
communicated to the client in writing, before or within a reasonable
time after commencing the representation, except when the lawyer will
charge a regularly represented client on the same basis or rate. Any

1 changes in the basis or rate of the fee or expenses shall also be
2 communicated in writing.¹

3 This provision was adopted as part of this Court's major Ethical Rules revision that
4 took effect on December 1, 2003.

5 Nothing in ER 1.5(b) exempts court-appointed lawyers who are paid by a
6 court or other governmental entity from the general writing requirement. Strict
7 application of this rule would require all public defenders and any other court-
8 appointed counsel – such as in dependency actions – who are paid by the
9 government to either ensure that their clients have been advised in writing that they
10 qualify for court-appointed counsel and will not be required to pay a fee or to send
11 written notice of it themselves. Either option would be a burden on an already
12 overburdened court-appointed system.

13 Connecticut, whose version of ER 1.5 is substantially the same as Arizona's
14 (and also requires that the fee be memorialized in writing), has made a substantive
15 change to resolve this dilemma. Rule 1.5(b), Connecticut Rules of Professional
16 Conduct, states that the writing requirement "shall not apply to public defenders or
17 in situations where the lawyer will be paid by the court or a state agency."

18 We propose adopting a version of Connecticut's exemption by adding a
19 sentence at the end of ER 1.5(b) to exempt "court-appointed lawyers who are paid
20 by a court or other governmental entity." A new comment would explain that the
21 phrase "court-appointed lawyers" is intended to include both public defenders and
22 private counsel appointed by the court.

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25 ¹ ER 1.5(b) differs from the American Bar Association Model Rule (MR) 1.5(b), which states that
26 the communication to the client about fees be "preferably" in writing, before or within a
reasonable time of commencing the representation. MR 1.5(b) also does not require that changes
in the basis or rate of the fee or expenses be communicated in writing.

1 Comment 2 to ER 1.5 states that the writing requirement “reduces the
2 possibility of misunderstanding.” In the situations addressed by this amendment,
3 there is little risk that a client will misunderstand the terms under which the lawyer
4 is providing legal services. The court or other governmental entity, not the client, is
5 paying for the lawyer’s services and the scope of representation, such as to
6 represent the client’s interests in a particular case, is clear. Typically the court
7 memorializes the appointment in an order or on the record.

8 Adopting these changes would result in the following amendments to
9 ER 1.5(b):

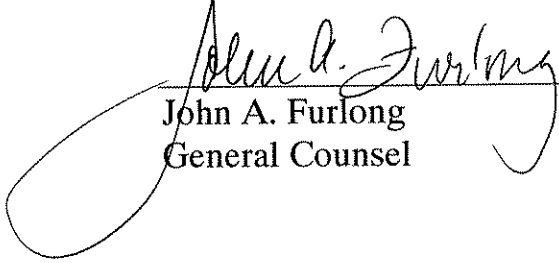
10 The scope of the representation and the basis or rate of the fee and
11 expenses for which the client will be responsible shall be
12 communicated to the client in writing, before or within a reasonable
13 time after commencing the representation, except when the lawyer will
14 charge a regularly represented client on the same basis or rate. Any
15 changes in the basis or rate of the fee or expenses shall also be
16 communicated in writing. The requirements of this subsection shall
not apply to court-appointed lawyers who are paid by a court or other
governmental entity.

17 In addition, a new comment [3] would be added to explain the exemption:

18 The lawyers exempted from ER 1.5(b)’s writing requirement are those
19 for whom there is little risk that the client will misunderstand the
20 terms. “Court-appointed lawyer” in ER 1.5(b) includes public
21 defenders and private counsel appointed by the court who are paid by
22 the government. In those types of representations, the court typically
memorializes the appointment in a court order or otherwise on the
record.

23 The State Bar urges the Court to adopt these changes to clarify ER 1.5(b).
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1 RESPECTFULLY SUBMITTED this 20th day of January, 2011.

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5 John A. Furlong
6 General Counsel
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8 Electronic copy filed with the Clerk
9 of the Supreme Court of Arizona this
10 20th day of January, 2011.

11 By: Kathleen Lundgren
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APPENDIX A

ER 1.5. Fees

(a) [no change in text]

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated in writing. The requirements of this subsection shall not apply to court-appointed lawyers who are paid by a court or other governmental entity.

(c) – (e) [no change in text]

COMMENT

Reasonableness of Fee and Expenses

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances.

The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. When the scope of the representation changes, in a material way, the lawyer should notify the client about the changes in writing. In a new client-lawyer relationship, however, a written understanding as to fees and expenses must be promptly established. Generally, furnishing the client with a simple memorandum or copy of the lawyer's customary fee arrangements will suffice, provided that the writing states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether

and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] The lawyers exempted from ER 1.5(b)'s writing requirement are those for whom there is little risk that the client will misunderstand the terms. "Court-appointed lawyer" in ER 1.5(b) includes public defenders and private counsel appointed by the court who are paid by the government. In those types of representations, the court typically memorializes the appointment in a court order or otherwise on the record.

[34] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule, including consideration of the degree of risk assumed by the lawyer at the outset of the representation. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider all of the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

Terms of Payment

[45] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See ER 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to ER 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of ER 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[56] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability

to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should discuss with the client alternative bases for the fee and explain their implications.

Prohibited Contingent Fees

[67] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Disclosure of Refund Rights for Certain Prepaid Fees

[78] Advance fee payments are of at least four types. The “true” or “classic” retainer is a fee paid in advance merely to insure the lawyer's availability to represent the client and to preclude the lawyer from taking adverse representation. What is often called a retainer but is in fact merely an advance fee deposit involves a security deposit to insure the payment of fees when they are subsequently earned, either on a flat fee or hourly fee basis. A flat fee is a fee of a set amount for performance of agreed work, which may or may not be paid in advance but is not deemed earned until the work is performed. A nonrefundable fee or an earned upon receipt fee is a flat fee paid in advance that is deemed earned upon payment regardless of the amount of future work performed. The agreement as to when a fee is earned affects whether it must be placed in the attorney's trust account, see ER 1.15, and may have significance under other laws such as tax and bankruptcy. But the reasonableness requirement and application of the factors in paragraph (a) may mean that a client is entitled to a refund of an advance fee payment even though it has been denominated “nonrefundable,” “earned upon receipt” or in similar terms that imply the client would never become entitled to a refund. So that a client is not misled by the use of such terms, paragraph (d)(3) requires certain minimum disclosures that must be included in the written fee agreement. This does not mean the client will always be entitled to a refund upon early termination of the representation (e.g., factor (a)(2) might justify the entire fee), nor does it determine how any refund should be calculated (e.g., hours worked times a reasonable hourly rate, quantum meruit, percentage of the work completed, etc.), but merely requires that the client be advised of the possibility of the

entitlement to a refund based upon application of the factors set forth in paragraph (a). In order to be able to demonstrate the reasonableness of the fee in the event of early termination of the representation, it would be advisable for lawyers to maintain contemporaneous time records for all representations undertaken on any flat fee basis.

Division of Fee

[89] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee by agreement between the participating lawyers if all assume joint responsibility for the representation and the client agrees, in a writing signed by the client, to the arrangement. A lawyer should only refer a matter to a lawyer who the referring lawyer reasonably believes is competent to handle the matter. See ER 1.1. If the referring lawyer knows that the lawyer to whom the matter was referred has engaged in a violation of these Rules, the referring lawyer should take appropriate steps to protect the interests of the client. Except as permitted by this Rule, referral fees are prohibited by ER 7.2(b).

[910] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

Disputes Over Fees

[1011] The State Bar of Arizona has established an arbitration procedure for the resolution of fee disputes. Each lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.